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Supreme Court of the United States

No. 73-1973

October Term, 1974

ART THEATER GUILD, INC., *et al.*,
Appellants,

vs.

STATE OF OHIO *ex rel.*, CLARK L. EWING,
Appellee.

On Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

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Supreme Court of the United States

No. _____

October Term, 1974

ART THEATER GUILD, INC., *et al.*,
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vs.

STATE OF OHIO *ex rel.*, CLARK L. EWING,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Ohio entered February 27, 1974, rehearing denied April 4, 1974, which modified, and affirmed, as modified the judgment of the Court of Appeals of Lucas County, Ohio (Sixth Appellate District). Said judgments upheld the constitutionality of Sections 3767.01 through 3767.99, Ohio Revised Code. Appellants submit this jurisdictional statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Ohio is reported at 37 Ohio St. 2d 95. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

This suit was brought pursuant to Chapter 3767, Ohio Revised Code by the appellee. The Court of Common Pleas of Lucas County, Ohio entered judgment on September 16, 1970. The Court of Appeals of Lucas County (Sixth Appellate District) entered its judgment on August 18, 1971. The Supreme Court of Ohio entered its judgment on February 27, 1974 and denied a motion for rehearing on April 4, 1974.

The jurisdiction of the Supreme Court to review this decision by appeal is based on Title 28, U. S. Code, Section 1257(2) in that this case draws in question the validity of statutes of the State of Ohio on the grounds of their being repugnant to the Constitution of the United States, and the decisions below were in favor of their validity.

STATUTE INVOLVED

The Ohio Nuisance Statute, Ohio Revised Code Sections 3767.01, et seq. is set forth in Appendix B.

QUESTIONS PRESENTED

1. Whether the statutory scheme of the Ohio Nuisance Statute, Ohio Revised Code Sections 3767.01 et seq., on its face and as applied to the exhibition of motion picture films, claiming First Amendment protection, unduly inhibits free expression in violation of the First and Fourteenth Amendments to the United States Constitution.

2. Whether the distribution and exhibition of the film "Without A Stitch" is activity protected by the First and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Appellee Clark Ewing, a private citizen residing in Lucas County, Ohio, brought this action in the Court of Common Pleas of Lucas County, Ohio, in the name of the State of Ohio, under the asserted authority of Section 3767.01, et seq., of the Ohio Revised Code, for the purpose of securing a temporary and permanent injunction to prevent the exhibition of the picture "Without A Stitch" in the State of Ohio, and for an accounting of the box office receipts, which he prayed be forfeited to the State of Ohio, all on the theory that the film constituted a nuisance, as defined by O.R.C. Section 3767.01 et seq.

The film opened at the Westwood Art Theater in Toledo, Lucas County, Ohio on July 17, 1970. This action was commenced on August 10, 1970.

The case was expedited and trial commenced on August 25, 1970.

On September 16, 1970 the Court of Common Pleas found the film to be obscene for the various reasons set forth in the opinion, Appendix I *infra*.

The trial court then proceeded, on its own motion, to set bond at Twenty Thousand ($20,000.00) Dollars for the purpose of permitting the film to be shown pending appeal to the Lucas County Court of Appeals, and, if necessary, to the Ohio Supreme Court. The only relief granted by the trial court was an injunction against appellants from exhibiting the motion picture in Ohio (stayed on appeal). The court added, "the question of forfeiture as prayed for in the petition is stayed pending final adjudication."

From this judgment an appeal on law and fact was taken to the Lucas County Court of Appeals. Under the now abandoned Ohio practice, such an appeal could be taken in certain classes of cases, and the appeals court heard the case *de novo* on the record below and on addi-

tional evidence. The only additional evidence heard went to establish the procedure for barring juveniles from the theater during the run of this picture.

The Court of Appeals made its own findings of fact and concluded, in an opinion set forth at Appendix G *infra*, that the film was obscene and should be permanently enjoined from exhibition in the State of Ohio. In addition, the Court of Appeals held that all of the remedies contained in Chapter 3767 of the Revised Code were mandatory and accordingly ordered the theater closed for a year, assessed a Three Hundred ($300.00) Dollar tax and ordered an accounting of the box office receipts from the date of the final order of the Court of Common Pleas through the final performance.

One of the three judges of the Court of Appeals concurred on the granting of the permanent injunction and the other relief but dissented from that part of the judgment which ordered an accounting of the box office receipts. The majority and dissenting opinions are contained in the appendix herein, Appendix G *infra*.

An appeal was then taken to the Ohio Supreme Court. That Court agreed to hear the case but limited its review to questions concerning the Ohio Nuisance Statute. The Ohio Supreme Court refused to review the question of the obscenity of the film.

On February 27, 1974 the Ohio Supreme Court announced its decision, reported at 37 Ohio St. 2d 95 *sub. nom. State ex rel. Ewing v. Without A Stitch*. A motion for rehearing was filed by the original plaintiff and this motion was denied on April 4, 1974.

The Ohio Supreme Court modified the judgment of the Court of Appeals in that it permitted an accounting of net profits only from the time of the original injunction. It held that the statute did not permit forfeiture of box office

receipts. It further held that although the theater could be closed for a year, the theater could remain open if the owners of the real estate posted a bond in the amount of the value of the real estate conditioned on the agreement not to show the proscribed film. However, the Ohio Supreme Court upheld the constitutionality of the statute against the various attacks based on the First and Fourteenth Amendments to the United States Constitution.

The Film and Its Exhibition

The film is in Danish with English sub-titles and lasts 96 minutes. The Westwood Art Theater followed the instructions of the distributor that no persons under 18 were to be admitted under any circumstances. The theater is a closed, or "hard top" theater, not a drive-in.

The trial was conducted without a jury. The judge viewed the film. The appellee testified as to his interest in banning the film. Appellee also called as a witness Dr. Anders Otterland, a medical school professor, who testified that the film represented a doctor practicing in an unethical fashion, while giving the impression that the doctor's techniques were ethical.

Appellants called three expert witnesses, Dr. Frank A. Hoffman, an expert on erotic art and folklore; Louis M. Pesce, former New York state film censor, and presently advisor to the film industry; and Dr. Michael Greicus, an English professor.

THE QUESTIONS ARE SUBSTANTIAL

I.

THE OHIO NUISANCE STATUTE (OHIO REVISED CODE §3767.01, et seq.) IS A CONSTITUTIONALLY INFIRM MEANS OF CONTROLLING OBSCENITY.

Sections 3767.01, et seq., Ohio Revised Code, upon which the instant action is based, sets out a statutory scheme for the prohibition of nuisances which the statute defines to include places where obscene films are exhibited. Section 3767.01. The Ohio Supreme Court in the case at bar has interpreted the definition of nuisance in this section to include a place where a single obscene film is exhibited, 37 Ohio St. 2d 95, 97-98 (1974), and has further superimposed upon the statutory scheme the definition of obscenity contained in Ohio's criminal obscenity statutes, Ohio Revised Code Sections 2905.34 and 2905.35.*

Upon a finding of nuisance, the statutory scheme permits injunctive relief, both temporary and permanent, before and after notice and hearing. Sections 3767.02, 3767.03, 3767.04. Violators may be summarily tried and punished by the court, sitting without a jury, Section 3767.07, and a maximum fine of $1,000.00 and six months imprisonment for each offense may be imposed. Section 3767.99. Additional penalties include forfeiture of all personal property on the premises, Section 3767.06, levy of special taxes and liens against the property where the nuisance occurred, Sections 3767.08, 3767.09, voiding leases of premises where nuisances occurred, despite the contractual relationship between landlord and tenant, Section 3767.10, and closing of the place against its use for any purpose for a year, Section 3767.06. And the Ohio Supreme Court, in the instant case, has interpreted these

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* Effective January 1, 1974, these statutes were superseded by Sections 2907.01 and 2907.32, similar in substance to the earlier legislation.

penalties to be mandatory, once a nuisance is found. 37 Ohio St. 2d 95, 103-105 (1974).

It is apparent that such a statutory scheme, as interpreted by the highest court in the State of Ohio, when applied to the delicate problem of separating constitutionally protected films from those which may be regulated by government, falls far short of the required constitutional standard under the First and Fourteenth Amendments. Moreover, it violates the requirements of substantive and procedural due process of law as well.

The statutory scheme is pockmarked with defects of constitutional dimension, which, individually or collectively, require the Court to strike it down *in toto*.

First, no standard of what constitutes a statutory nuisance appears in the statute. The Ohio Supreme Court, in an attempt to cure this ambiguity, has engrafted upon the statute the definitions of obscenity contained in Ohio's criminal obscenity statutes, Sections 2907.01 (formerly 2905.34) and 2907.32 (formerly 2905.35), Ohio Revised Code. To the extent that these statutory definitions designate as obscene depictions of mere nudity, see *Roth v. United States*, 354 U.S. 476 (1957), and sexual conduct with the requisite prurient appeal, but neither patent offensiveness nor lack of serious value, see *Miller v. California*, 413 U.S. 15 (1973), these statutes are void for overbreadth. To the extent that they include such ambiguous language as "in a way which tends to represent human beings as mere objects of sexual appetite", Section 2907.01, (F) (2), and appeal to prurient interest "for its own sake" for "commercial exploitation" rather than for a "genuine . . . moral . . . purpose" Section 2907.01 (F) (5), they suffer the vice of vagueness. See *Musser v. Utah*, 333 U.S. 95 (1948); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968). The overbreadth of these statutory definitions irretrievably contaminate the nuisance statute upon which

they have been engrafted by judicial construction. *N.A.A.C.P. v. Alabama*, 377 U.S. 288 (1964).

Second, Section 3767.01 describes only obscene films as nuisances subject to the penalties of the statute, but not books, magazines or pictures of similar character or content. Such a classification is both an arbitrary denial of substantive due process and equal protection of the laws guaranteed by the Fourteenth Amendment. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

Third, Section 3767.04 authorizes the trial court to issue temporary restraining orders and injunctions without hearing evidence and without any standards of proof except "to the satisfaction of the court or judge." Provision for the release of such judicial restraints cast the burden of proof of innocence upon those restrained. Failure to make such proof allows these restraints to remain in effect until final disposition of the case.

In addition to the substantial due process questions raised by such provisions, see *Speiser v. Randall*, 357 U.S. 513 (1968), serious issues of prior restraint and inhibition of distribution of protected materials are presented by the interlocutory powers given the trial court by this statute. See *Near v. Minnesota*, 283 U.S. 697 (1931); *Carroll v. Princess Anne County*, 393 U.S. 175 (1968).

Fourth, Section 3767.04 requires that an owner of premises, previously enjoined without proof of his guilty knowledge, in order to avert the closing of his premises until final judgment, must, in addition to paying costs and posting bond in the full value of the real estate, prove to the satisfaction of the court his own good faith and the innocence and lack of guilty knowledge of owners of personal property on the premises. Such shifting of the burden of proof of *scienter* from the censors to the censored as a precondition to permitting exhibition of not-yet-adjudicated films claiming First Amendment protection operates

as a prior restraint and unwarranted intrusion on distribution of borderline protected materials. *Near v. Minnesota, supra, Smith v. California,* 361 U.S. 147 (1961). No less do the other burdens imposed upon one who would avert such closing of his premises inhibit free expression.

Fifth, Section 3767.05 permits proof of prima facie nuisance at the trial on the merits by "evidence of the general reputation of the place" or "an admission or finding of guilt of any person under the criminal laws against . . . lewdness." The statute allows such proof to be admissible to prove knowledge, acquiescence and participation, as well as nuisance. Coupled with the statutory admonition in Section 3767.06 that "every defendant in the action is presumed to have knowledge of the general reputation of the place," these provisions effectively obviate the constitutional requirement that the censor prove guilty knowledge as a precondition to suppression of expression, *Smith v. California, supra,* and the similar self-imposed requirement of the Ohio Supreme Court in this case that guilty knowledge is an essential element of proof of nuisance. 37 Ohio St. 2d 95, 101-102 (1974).

Sixth, Section 3767.06 authorizes establishment of nuisance at the final hearing on the merits "as provided in Sections 3767.01 to 3767.11". Thus, all of the inadequate procedures employed at the temporary restraining order and injunctive stages, including the inadequate standard of proof "to the satisfaction of the court," and improper shifting of the burden of proof from complainant to the defendants, have been transported to the conduct of the final hearing, the harsh consequences of which, in terms of permanent injunctive orders, taxes and penalties, have been previously described.

The imprecision of such a means of controlling distribution of films claiming First Amendment protection is

apparent. Its due process implications are equally evident. *Speiser v. Randall, supra.*

Seventh, Section 3767.06 directs, upon establishment of nuisance at the final hearing on the merits, "the closing of the place against its use for any purpose . . . for a period of one year" and the sale of personal property on the premises. Other penalties, previously enumerated, are mandatory under the statute as construed by the Ohio Supreme Court in the opinion below. Sections 3767.08, 3767.09, and 3767.10. Quite apart from the harshness of all of these accumulated penalties as an inhibition upon the distribution of borderline protected materials, the closing of a theater for a year prevents it, during that period, from exhibiting any film, whether or not sexually oriented, whether or not protected by the First Amendment and whether or not previously adjudged to be obscene in a court of law. That such a result, after the adjudication of obscenity of *one* film, under the questionable standards and procedures provided by this statute, raises implications. of prior restraint of the most serious kind. See *Near v. Minnesota, supra; Pursue v. Huffman,* 14 Cr. L.R. 4221 (W. D. Ohio 4/20/73.)

Eighth, Section 3767.06, pointed out by the court below as ameliorating the harsh result of a one-year closing, 37 Ohio St. 2d 95, 104-105 (1974), permits the release of an order of closing only if the owner of premises pays all costs, posts bond in the full value of the property, and demonstrates to the court's satisfaction that he will not permit the nuisance to reoccur, as outlined in Section 3767.04. Whether or not such option of the *owner of the premises* ameliorates the harshness of the remedy as to *him,* it does nothing to save the tenant in possession or operator of the theater, neither of whom have any such correlative statutory right. Neither does it alleviate the problem of compelling the owner to come forward and

disprove affirmatively what the complainant was never required to prove under the statute to obtain the closing order in the first instance. Nor does it deal in any way with the constitutional problem of compelling a citizen to pay a substantial penalty to exercise his First Amendment freedoms. *Speiser v. Randall, supra.*

Ninth, Section 3767.01, which purports to define nuisance, makes no distinction between private possession and public dissemination of obscene materials and applies sanctions against both. Governmental regulations of private possession and use of obscenity is constitutionally impermissible. *Stanley v. Georgia,* 394 U.S. 557 (1969). No attempt was made by the Ohio Supreme Court in the opinion below to construe this statute to avoid such obvious overbreadth. Appellants have standing to attack this constitutional infirmity even though their conduct might have been reached by a more narrowly drawn piece of legislation. See *Griswold v. Connecticut,* 381 U.S. 479 (1965).

Tenth, Section 3767.07 provides for summary trial and punishment of persons in contempt of orders issued under authority of Sections 3767.01, et seq. Section 3767.99(A) provides a maximum penalty of six months imprisonment and $1,000 fine for each offense. Under such risk of serious penalty and incarceration upon a guilty finding, trial by jury must be permitted. *Bloom v. Illinois,* 391 U.S. 194 (1968).

Eleventh, although the statutory scheme permits the censorship of materials which claim First Amendment protection it provides no procedural assurance of an immediate hearing after either temporary or permanent restraint, no assurance of an immediate judicial decision thereafter, and no assurance of a speedy and accelerated judicial review. Such a censorship system is constitutionally impermissible. *Freedman v. Maryland,* 380 U.S. 51 (1965);

Teitel Film Corp. v. Cusack, 390 U.S. 139, 141-142 (1968); *Blount v. Rizzi*, 400 U.S. 410 (1971).

Twelfth, Section 3767.04 permits *ex parte* restraining orders against the distribution and transportation of films claiming First Amendment protection without a prior judicial determination of their obscenity. See *Heller v. New York*, 413 U.S. 483 (1973), *Rowden v. Kentucky*, 413 U.S. 496 (1973).

Thirteenth, Section 3767.06 provides that "every defendant in the action is presumed to have knowledge of the general reputation of the place." Since evidence of the general reputation of the place is admissible to prove the nuisance, knowledge of, acquiescence and participation in maintaining it, Section 3767.05, and, since guilty knowledge has been construed to be a necessary element of a finding of nuisance, 37 Ohio St. 2d 95, 101-102 (1974), see also *Smith v. California, supra*, such presumption substitutes for proof of a critical fact in establishing a nuisance under the statute. It is apparent that there is no rational connection between the fact of being named a defendant in an action under the Ohio Nuisance Statute and any degree of guilty knowledge of the general reputation of a place where a nuisance may have been maintained. The presumption must therefore be regarded as irrational or arbitrary because clearly the presumed fact is not "more likely than not to flow from the proved fact on which it is made to depend." *Leary v. United States*, 395 U.S. 6, 36 (1969).

Thus, it is apparent that the Ohio Nuisance Statute, in whole or in many of its parts, falls substantially short of the constitutional mark. The Ohio Supreme Court's desperate attempt to save it by construction has only served to emphasize its inherent constitutional defectiveness. By interpreting the harsh statutory consequences

to flow mandatorily and without exception from a finding that a theater has exhibited a single film adjudged under loose statutory procedures to be obscene, the Court below has squeezed whatever flexibility out of the legislation there might have been, and which might arguably have saved it from constitutional decimation.

The Ohio legislature and its highest Court, in a delicate area which requires the precision of an artist's finest brush strokes, has painted upon the canvas of legitimate governmental obscenity regulation with a dripping wall roller.

Appellants are aware of no decided case in which this Court has yet considered the constitutional implications of a state's attempt to control obscenity by means of a nuisance statute of the type here involved.*

In an area in which sensitive regulatory procedures are constitutionally compelled, *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Miller v. California, supra*, this Court's plenary consideration of this issue is imperative.

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* The Court has noted probable jurisdiction in two such cases, *Huffman v. Pursue, Ltd.*, 14 Cr. L. R. 4221 W. D. Oh. 4/20/73 and *MTM, Inc. v. Baxley*, 365 F.Supp. 1182 (N.D. Ala. 1973) in which issues other than those raised in this jurisdictional statement are also presented.

II.

THE FILM IS CONSTITUTIONALLY PROTECTED EXPRESSION.

The Ohio Supreme Court limited its review to the questions surrounding the Ohio Nuisance Statute and refused to review the question of the obscenity of the film.

The Court of Appeals first found that the film ran afoul of the tests of *Roth v. United States*, 354 U.S. 476 (1957) and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). The Court then added,

> We have also considered as indicative but not conclusive of national standards the laws of the State of Ohio and other states. See *Roth, supra*, p. 485.

Footnoted to this sentence was the language of Section 2905.34, Ohio Revised Code, defining obscenity, and also statutes making criminal the following acts: adultery or fornication, inducing illicit intercourse, prostitution, lewdness and assignation, indecent exposure, nudism, and sodomy.

This litany followed a theme offered by the Court of Common Pleas in the original decision, in which contemporary community standards were determined by reviewing what acts are made illegal by the state legislature. At paragraph 10 of its findings of fact the Court of Common Pleas said:

> That acceptability by a movie audience is not the true criteria of the measurement of community standards relating to the representation of sexual matters or acceptance of a movie by the community because the attending audience, as in this case, is a very small segment of the community. The proper criteria for a valuation of contemporary standards of the community relating to the representation of sexual matters must necessarily be the enacting and enforcement of laws by that community governing the conduct of citizenry; that simple reference to the Ohio

> Revised Code sets forth the legal moral standards of the people of Ohio, including Lucas County, on sex matters and that there is generally attempted enforcement in this community. These Sections include, but are not limited to, the following:
>
> Sec. 2905.08 O.R.C., Adultery or Fornication
> Sec. 2905.10 O.R.C., Prostitution
> Sec. 2905.30 O.R.C., Indecent Exposure
> Sec. 2905.30 O.R.C., Solicitation of unnatural sex act
> Sec. 2905.31 O.R.C., Nudism
> Sec. 2905.44 O.R.C., Sodomy
>
> There are existing similar statutes in the majority of states giving an inference of national community standards.

It is interesting to note this technique for determining contemporary community standards was seized upon by Charles H. Keating, Jr. in his dissenting opinion in the *Report of the President's Commission on Obscenity and Pornography*, Bantam Books, 1970, p. 578, et seq. In his Exhibit "H" he argues that a film "can be so grossly obscene that it is 'obscene as a matter of law.'" He then reproduces a part of appellee's brief below in this case wherein it is argued that since the film depicts acts that are illegal in Ohio, the film is obscene as a matter of law. At p. 699:

> It is the prerogative of this Court to take judicial notice of the laws of the state of Ohio relating to sexual morality and apply them in determining the issue of obscenity in this case.

In closing he quotes *in toto* paragraph 10 from the Findings of Fact of the Common Pleas Court, as set forth at p. 14, *supra*.

The Court of Appeals has seized on this as is evident from its opinion, as quoted at p. 14, *supra*.

Furthermore, the Ohio Supreme Court has seemingly adopted this strange technique for determining contemporary community standards. In *State ex rel. Keating v. Vixen*, 27 Ohio St. 2d 278 (1971) *reversed and remanded*, 413 U.S. 905 (1973) *on remand* 35 Ohio St. 2d 215 (1973) the Ohio Supreme Court approves the technique of permitting the exhibition of an otherwise "obscene" film if portions depicting actual or purported acts of sexual intercourse are deleted. Such wholesale disregard of the mandate to view a film, "as a whole" in determining its dominant theme, *Roth v. United States, supra*, is indicative of the unorthodox techniques employed by Ohio courts in determining obscenity.

It is submitted that fairness demands a review of the film at bar in light of the tests set down by this Court in *Miller v. California*, 413 U.S. 15 (1973).

> A state offense must also be limited to works which, *taken as a whole*, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, *taken as a whole*, do not have serious literary, artistic, political or scientific value. (Emphasis supplied.)

Miller was decided on June 21, 1973, almost two years after the instant Court of Appeals decision. Since the Ohio Supreme Court refused to review the film's obscenity, no court has reviewed the obscenity of this film since *Miller* was announced.

The reliance by the lower Ohio courts on patently irrelevant standards requires a review of the obscenity of the film in question on the basis of present case law.

CONCLUSION

This jurisdictional statement has attempted to present a brief description of the substantial issues involved in this appeal and why this Court should give plenary consideration to them.

Appellants were permanently enjoined from exhibiting a film which they continue to assert was constitutionally protected expression. By the application of bizarre reasoning, the trial court and the court of appeals found the film to be obscene and, therefore, a nuisance.

As a consequence, the theater which exhibited the film was ordered closed for a year for all purposes, a tax was assessed against the appellants, their personal property was forfeited, and an accounting of box office receipts was ordered.

All of these penalties resulted from the authority and application of the Ohio Nuisance Law, as construed by the Ohio Supreme Court.

Both the constitutionality of the Ohio Nuisance Law and the validity of the judicial finding that the film, "Without a Stitch" was obscene are presented to this Court by the within appeal.

Drawing an appropriate balance between legitimate state interests in controlling obscenity and protection of freedom of expression continues to be a matter of urgent business of this Court. In an area where "sensitive tools" *Speiser v. Randall*, 357 U.S. 513, 525 (1958), are required to regulate the dissemination of obscenity, both the Ohio Nuisance Law and the means by which the Ohio courts

separate protected from unprotected expression require the plenary attention of this Court.

Respectfully Submitted,

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